***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

76-1085

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

Docket No. 76-1085

-against-

JOSE ARAUJO, JOHN DOE,
a/k/a/ "NENO", and
JORGITA RIVERA,

Defendants-Appellants.

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BRIEF FOR APPELLANT
JOSE ARAUJO

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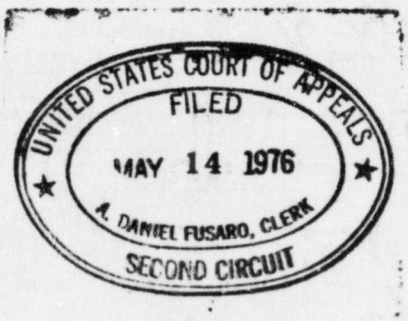
ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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CONTENTS

TABLE OF CASES

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----------X

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## QUESTIONS PRESENTED

1. Whether permitting the jury to consider abundant evidence of prior similar acts of negotiating counterfeit currency by co-defendant and government witnesses deprived Appellant Jose Araujo of a fair trial.

(Questions Presented)

2. Whether both Court and Prosecutor improperly vouched for and bolstered the credibility of key Government witnesses so as to deprive appellant Araujo of his right to a fair trial.

3. Whether the Court commented on the failure of the appellant Araujo to testify on his own behalf in such a fashion as to have deprived him of a fair trial.

4. Whether the Court demonstrated an attitude of belief in the guilt of appellant Araujo to the jury, so as to have arrogated the jury function of determining guilt, and thereby depriving appellant Araujo of his right to a fair trial by an impartial Court.

## STATEMENT PURSUANT TO RULE 28(a) (3)

### PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Irving Ben Cooper) rendered on February 18, 1976, after a jury trial, convicting appellant Jose Araujo of conspiracy to make counterfeit currency, in violation of 18 U.S.C.§371 (Count I); making a plate designated for printing an obligation of the United States, in violation of 18 U.S.C. §472 and §474 (Count II); making counterfeit obligations of the United States, in violation of 18 U.S.C. §§471 and 2 (Count III); and selling, exchanging, and receiving counterfeit obligations of the United States, in violation of 18 U.S.C. 473 (Count IV). Araujo was sentenced to serve a one-year term of imprisonment on each count, the sentences to be served concurrently.

The Court continued Ralph S. Naden, Esq., as counsel for appellant Araujo on his appeal, pursuant to the provisions of the Criminal Justice Act.

## STATEMENT OF FACTS

### I. The Trial

Appellant Jose Araujo and fourteen other persons were charged with a conspiracy to make and transfer counterfeit obligations of the United States, in violation of 18 U.S.C. 371 (Count I), alleged to have commenced on or about January 1, 1975. The indictment also charged appellant Araujo with committing three substantive violations of the Federal laws: making a plate designated for printing an obligation of the United States, in violation of 18 U.S.C. §§472 and 4 (Count II); making counterfeit obligations of the United States, in violation of 18 U.S.C. §§471 and 2 (Count III); and selling, exchanging, and receiving counterfeit obligations of the United States, in violation of 18 U.S.C. §§473 and 2 (Count IV). These substantive counts arose from Araujo's alleged participation during a ten-day period during which photographic negatives of United States currency were made in the basement of a building in which he was superintendent.

Araujo and four others were tried in the Southern District of New York, the Honorable Irving Ben Cooper presiding. [1]

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1. The indictment is B in the separate appendix filed relative to the brief of co-defendant Jorgita Rivera, and in which appellant Araujo was permitted to join. Tried with Araujo were John Doe, a/k/a "NENO", (appellant Hichez); John Doe, a/k/a "Chuleria", the recipient of a judgment of acquittal during the trial (Tr. 1165); Felix Irizarri, who pleaded guilty during trial (Tr. 973); and Jorgita Rivera, also an appellant in this action.

A. Evidence of Prior Similar Acts

By Co-Defendants and Others

The Government's case began with extensive testimony about prior activites of counterfeiting in which appellant Araujo did not participate in any fashion. The testimony detailed how Adames, Facundo, Jacobo, Almeida, Irizarri - all government witnesses - and others, negotiated for the purchase of counterfeit money and distributed thousands of dollars in phony bills to merchants in and around New York and New Jersey.

This testimony was admitted over strenuous and repeated objections by defense counsel (62, 78-82, 104-5, 115)[2]. Appellant Araujo, whose alleged role in this conspiracy was minimal, was particularly tarnished by the voluminous testimony about prior negotiation of counterfeit money because of the graphic manner in which Adames described passing it. Objection was timely made by counsel in the following fashion.

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2. Numerals in parentheses refer to pages of the transcript of the trial.

"He (Araujo) never distributed any money, never received any money... I believe that the testimony with regards to these alleged co-conspirators who did perform these acts is so highly prejudicial... that it would be erroneous to include him (Araujo) in this grouping in the first instance, so the second part of my application with regards to a mistrial and a severance is renewed here.... (Tr. 106).

The voluminous nature of the testimony about prior acts of passing counterfeit money by the central figures of the later, charged conspiracy occupied the better part of the first trial week. Manuel Adames described purchasing the counterfeit, preparing it, and passing it to unsuspecting merchants, demonstrating uncanny ability to remember names, dates, places, and minute detail about who said what to whom, on the at least seven different occasions when the counterfeiters struck.(Tr.47-54, 96-98). See Brief of appellant Rivera, pps. 4-10. Adames described how he, Rafael Jacobo, Rafael Facundo[3], and others, purchased, processed, and negotiated many thousands of dollars in false money received from "Victor", Angel Molina, and Luis Rodriguez (Tr. 60-70, 72-78, 84-100, 119-125, 150-175).

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3. Rafael Facundo was not a defendant in this case, but had been charged with related offenses in California Federal District; he pleaded guilty in the Southern District of New York pursuant to Rule 20, Fed. R. Cr. P.

The typical manner in which these men distributed the counterfeit money before the onset of the conspiracy charged in this indictment was to visit a series of liquor stores in New York neighborhoods, purchase a quantity of liquor with a counterfeit twenty or fifty dollar bill, and receive the change in good currency. In this manner a large quantity of counterfeit currency was passed - two thousand dollars on two separate occasions (Tr. 69-70, 95) and five thousand dollars on at least one other (Tr. 84). These were only three of the many separate days these men distributed large quantities of bad money.

Illustrative of the weight the jury was forced to place on this lengthy and detailed testimony is the fact that evidence of these prior similar acts of distribution of counterfeit money was spread for almost the first two hundred pages of Adames direct testimony, or almost one-third of his entire direct testimony - devoted exclusively to prior, similar acts.[4]

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4. It was not until at least Tr. 189 that the jury began to hear of events that led to the decision on the part of Adames and company to manufacture their own money, and even that evidence of what motivated these men to commence their own enterprise was not properly treated, but continued to fall within the category of prior similar acts. Tr. P. 216 contains the first mention of manufacturing by these parties.

The purchase, preparation, processing, and distribution of counterfeit money during the months of November and December, 1974, by Adames, Facundo, Jacobo, Irrizarri, and Almeida, described by Adames in the first two hundred pages of trial testimony was repeated and emphasized by the other Government witnesses during their own time on the witness stand. (Tr. 813-838, 1014-21, 1047-51, 1217-1222).

The potential for confusion in the minds of members of the jury is graphically illustrated by the Courts' having misunderstood the import of evidence adduced at the trial and having communicated a faulty interpretation of the facts during an exchange with counsel for appellant Araujo during cross-examination of witness Adames. (Tr. 705).

"Don't forget", the Court admonished counsel, "this testimony here from this witness... that your client was in on many of these conferences, and he saw the counterfeit money being divided up, et cetera, et cetera. There are many episodes...." (Tr. 705).

In the ensuing exchange, undertaken in the presence of the jury, it became clear that the Court's interpretation was not correct. (Tr. 706).

B. Evidence Pertaining to the Crimes Charged in the Indictment.

Substantially all the evidence presented against appellant Araujo was testimony given by alleged co-conspirators Manuel Adames and Rafael Facundo, both of whom had already pleaded guilty to charges arising out of the same counterfeiting scheme[4]. After raising money, finding participants with the requisite skills, and procuring equipment, the group began operating in a basement apartment located at 511 West 156th Street, in Manhattan, in a building in which appellant Araujo was the superintendent (Tr. 274). The produced photographic negatives of genuine currency in that location for approximately ten days, leaving after a police raid resulted in seizure of the materials there. The operation was commenced anew in an apartment on Coster Avenue, in the Bronx. (Tr. 402, 458).

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4. The plot to manufacture and distribute this $6,000,000 in counterfeit money was spurred by the Adames' group inability to purchase false money from its original sources, and because Adames and company had been relieved of a substantial sum of money paid for counterfeit money by a trick of Molina, who delivered only newspaper cuttings wrapped in brown paper (Tr. 189,214,219). It was then that Adames, Facundo, Irizarri, Almeida, and Jacobo joined forces with Molina and Rodriguez in a scheme to raise money, purchase photographic and printing equipment, and secure a place in which to work

It was in the latter apartment that additional negatives were devloped and currency printed on new equipment. According to the testimony, Araujo had no contact with the group either before they arrived at 156th Street or after they commenced work at Coster Avenue. His only involvement with the enterprise was during the ten day period that work took place in the basement of the building he tended, and in one short meeting the day after the police raid. (Tr. 708, 710, 945).

Araujo received no compensation nor did he participate in dividing up the counterfeit (Tr. 937). No proof was adduced as to who rented the basement apartment on behalf of the group or who actually rented it to the group (Tr. 264). Araujo's activities were that he showed Facundo where the electrical circuits were placed (Tr. 868), that he was present when negatives were made and commented upon their quality (Tr. 276-7, 312, 314 338, 868, 873), that he held a manila envelope containing nega ives overnight (Tr. 879), that he reported to Adames that Federico Ruiz, or "Papito" - the preparer of negatives - was not working well, (Tr. 354-6), and that he went to the bank on one occasion to exchange an old bill for an unsoiled one, unsuccessfully (Tr. 873-4). He also met with

some of the individuals in the group the day after the police raid after they had come to his home and brought him to a parking lot for a conference; it was at that last meeting that he was said to have requested an opportunity to invest money in the scheme "if someday you renew operations" (Tr. 892). That was the last time he saw any of those people until after the arrest, according to testimony (Tr. 946).

His familiarity with other members of this group was so slight, and his participation so minimal, that he was not even called by name during the time at 156th Street, but was referred to as "the super" (Tr. 353). He was so little involved, according to the testimony, that it was Facundo who bought and installed locks to the basement apartment door (Tr. 952).

The proceeds of the production scheme were allocated as follows: Adames - $400,000; Rodriguez - $1,200,000; Molina - $100,000; Rivera - $40,000; Facundo - $40,000 (Tr. 482).

All of the witnesses who testified were subject to impeachment by virtue of their own criminal status, by the prospect of criminal acts for which they had not been prosecuted, and by the fact that they had previously lied to Government authorities. At the time of trial, Manuel Adames was awaiting the imposition of sentence by Judge Cooper, having entered a plea of guilty to three of the eight counts charged against him

in the indictment. (617,625). Over objection by defense counsel (626,631), the Government elicited that Adames had been told by the Prosecutor that he could expect to benefit from his testimony only if that testimony were truthful (Tr. 625). Further, he had been informed by the same Assistant U.S. Attorney who conducted the prosecution of the matter that he would be prosecuted for perjury if he testified falsely (Tr. 626).

C. Defense Motions

At the close of the Government's case, defense counsel moved for a judgment of acquittal on the grounds, inter alia, that a fair trial was precluded by (1) the Government's vouching for the credibility of its key witnesses (1282-1284) and the introduction of extensive and highly prejudicial testimony concerning the prior similar acts (Tr. 1285).

Citing a passage in this Court's slip opinion in U.S. v. Camapanile, Docket No. 74-2160, slip opinion 3109,3118(April 24, 1975, Judge Cooper criticized the Government's conduct in the presentation of the instant matter[6]:

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6. The Court cited a passage that had been deleted from the published opinion in Camapanile, which focussed on the Government's having introduced "extraneous and prejudicial material that could only increase the risk of reversal and a new trial".

"In sum", the Court stated here, "we are compelled to state that the Government came perilously close to a dismissal on that ground alone".

(Tr. 1307).

D. The Defense Case

Appellant Araujo neither testified nor presented any witnesses.[7]

E. The Court's Charge to the Jury

In his instruction to the jury on how it was to consider the evidence of prior similar acts, Judge Cooper charged:

> Then how may it be considered, this evidence dealing with prior similar acts? The jury may consider that evidence dealing with the alleged acts of a like nature solely in determining whether the defendant acted with guilty knowledge or intent.
>
> Such evidence, relating to prior acts, may not be considered by the jury for any other purpose whatsoever. I emphasize, the jury is not to infer that the defendants have a criminal propensity or bad character because of this evidence.

(Tr. 1595)

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7. Appellant Rivera did not testify either, although appellant Hichez testified in his own behalf (Tr. 1308-56).

In failing to note that appellant Araujo was not even remotely alleged to have been involved in those prior events, Judge Cooper charged that the evidence

> was not introduced to show another conspiracy. It is to explain the particular conspiracy before you, and that therefore you may consider that evidence in order to understand the conspiracy before you. Do I make that clear? Does anybody have any doubt about that?
>
> (Tr. 1566).

On witness credibility, the Court charged:

> As with courage, so it is with truthfulness. It frequently comes from the most unlikely sources. Those from whom we rightfully expect the truth very often we find it not forthcoming, and those from whom we would hardly expect it, from them sometimes a veritable avalanche of convincing disclosures gushes forth.
>
> (Tr. 1601)

He commented further, in seeming support of the witness' credibility:

> I mentioned before the tendency of human beings to lie when confronted with an accusation. You bear that in mind -- the natural instincts of people. Is that your impression from this testimony with regard to these particular people? Or did you get the impression that any one or all are nothing but unmitigated liars? That is for you. It is all right for any one of us to get up and bang away at a witness and we have a perfect right to say that, says a lawyer, he is a rotter, unworthy of consideration at all of any kind. He is this. He is that. That is to be considered, of course.
>
> But the final analysis and the final grading is yours.
>
> (Tr. 1603).

Judge Cooper reminded the jurors that as the jury assessed the credibility of the Government witnesses, they should remember that the witnesses knew that both the Court and the prosecutor were watching them to detect evidence of perjury, not failing to emphasize the enormity of fooling Court, prosecutor, and jury alike:

> ... Did you get the impression that he was wise enough to know that he was being carefully watched and would know that he was carefully watched by a judge and prosecutor alike as well as by the jury and did he consider the impossibility of overcoming that enormous hurdle?

(Tr. 1604).

When defense counsel objected to this portion of the charge (Tr. 1625-6), the Court explained the position as follows:

> ...All I was doing was asking them to take the true measure of that kind of a witness: Was he feeding us all because he wanted to give himself as much of a break, so to speak, or was he just inventing all of this in order to be on our good side? Was that his motive? Or is it likely, and this is something for you to consider, that he recognized that no matter how much he might want to lie he wouldn't dare do so because the Judge is watching what he says, the prosecutor is watching what he says, and the jury is watching what he says, and therefore he would be inclined to come forward and tell the truth. That is for you, I said, for them to consider, and that is an equally important possibility as is the possibility that the witness got on the stand and for one reason or another falsified all the way down the line.

(Tr. 1626-7).

In his charge to the jury on the law of overt acts, Judge Cooper defined overt acts and then gave the following examples:

> Let me give examples of overt acts. They are all set forth in the indictment.
>
> That certain defendants, naming them, delivered quantities of money to Molina and other persons to finance the manufacturing of counterfeit Federal notes.
>
> Another one:
>
> In or about March of 1975, the defendant Araujo provided an apartment at 611 West 156th Street, New York, N.Y.
>
> Perfectly innocent on its face, providing an apartment, but that is an overt act and it is set forth (emphasis supplied).
>
> (Tr. 1564).

Counsel excepted to the Court's charge, but was denied relief with the following explanation:

> All I did was give them an illustration of an overt act and I happened to use the overt act dealing with a defendant still on trial and not with regards to defendants who are no longer before the jury.
>
> I saw the one with regard to Araujo and I read it word for word. I said that it is listed as an overt act.
>
> (Tr. 1630).

In instructing the jury not to be swayed by considerations of what the sentence might be, the Court charged as follows:

> How do you know what a defendant is, and what his background is, a defendant who hasnot taken the stand and against whom you can't hold a thing because he hasn't taken the stand? How do you know who he is?
>
> So you lay off of that because the Judge says it is none of your business.
>
> A sadness has come to me because well-meaning jurors have nevertheless allowed that to enter into their determination and have acquitted. It is enough to make my flesh crawl.
>
> (Tr. 1619).

In denying counsel's motion for a mistrial based upon that portion of the charge, the Court acknowledged that

> we did protect to some extent and tried to lock the door after the cow escaped, something which could very well have galloped into the jury's mind, that a particular defendant did not take the stand because there was something the jury might find out about him.
>
> (Tr. 1637).

## II. The Sentencing

After the jury returned its verdict finding appellant Araujo guilty of the four counts charged (Tr. 1652), the Court sentenced him to serve a term of imprisonment of one year on each count, the terms to be served concurrently (Tr. 1687).

## ARGUMENT

### Point I

PERMITTING THE JURY TO CONSIDER ABUNDANT EVIDENCE OF PRIOR SIMILAR ACTS OF NEGOTIATING COUNTERFEIT CURRENCY BY CO-DEFENDANT AND GOVERNMENT WITNESSES DEPRIVED APPELLANT ARAUJO OF A FAIR TRIAL.

Appellant Araujo adopts *in toto* the argument made by appellant Rivera on this same point on pages nineteen to twenty-three of the latter's brief.

The testimony of prior similar acts should not have been admitted into evidence in the first place. Having allowed the testimony to come in, the Court compounded its original error by failing to make proper distinction between individuals who had

participated in the passing of counterfeit money in November and December of 1974 and those on trial who had neither knowledge nor participating membership in the earlier group.

Instead of assuring the proper distinction by the jury, the Court's instruction actually encouraged the jury to view the evidence indiscriminately as to the accused on trial, including Araujo, and to weigh it "solely in determining whether the defendant acted with guilty knowledge or intent"[8].

As for Araujo, having neither participated in or knowing about the earlier transactions, according to the evidence, this charge was clearly in error.

This voluminous testimony about prior transactions necessarily tainted the atmosphere of jury deliberations as they determined Araujo's fate.

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8. Tr. 1595. See infra, p. 13. "I emphasize", the Court continued, "the jury is not to infer that the defendants have a criminal propensity or bad character because of this evidence". Again, in painting with a broad brush, the Court encouraged the jury to do the opposite of what it would have intended - precisely to consider the evidence against the defendant, and the defendants, on trial.

## Point II

BOTH COURT AND PROSECUTOR IMPROPERLY VOUCHED FOR AND BOLSTERED THE CREDIBILITY OF KEY GOVERNMENT WITNESSES SO AS TO DEPRIVE APPELLANT ARAUJO OF HIS RIGHT TO A FAIR TRIAL.

Appellant Araujo hereby adopts in toto the argument made by appellant Rivera made in Point II of argument, as embodied on pages twenty-four through twenty-six of Rivera's brief.

## Point III

THE COURT COMMENTED ON THE FAILURE OF APPELLANT ARAUJO TO TESTIFY IN HIS OWN BEHALF IN SUCH A FASHION AS TO HAVE DEPRIVED HIM OF A FAIR TRIAL.

It is axiomatic that a Court must not comment about the failure of a defendant to testify in his own defense during a criminal trial. Griffin v. California, 380 U.S. 609(1965). Further, neither the Court nor, as a consequence, a jury, should speculate about the reasons why a particular defendant did not testify. Martinez v. U.S., 333 F. 2d. 80 (2d. Cir., 1964), cert. den. 379 U.S. 907 (1964). The Court in its charge quickened the jury's imagination as to the reasons why Araujo did not testify (Tr. 1619), taking note of some of the consequences in comments at Tr. 1637:

> We did protect to some extent and tried to lock the door after the cow escaped, something which could very well have galloped into the jury's mind, that a particular defendant did not take the stand because there was something the jury might find out about him.

This attempt by the Court to lock the door was plainly inadequate to undo the damage done by the Court's plain error of having referred to appellant Araujo's failure to testify[9]. Then, attempting to deliver to the jury a graphic expression of sentiment by which its members could understand the Court's instructions, Judge Cooper kicked the door of speculation wide open once again:

> A sadness has come to me because well-meaning jurors have nevertheless allowed that to enter into their determination and have acquitted. It is enough to make my flesh crawl.
>
> (Tr. 1619).

The burden of causing the Court's human flesh to crawl is far higher than the law ordinarily anticipates a citizen bear when he or she takes an oath to do justice. Linking it, as the Court did in its charge, to the idea of acquittal, was undoubtedly more than this jury could surmount.

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9. And, in addition, appellant Rivera, who did not testify. It is of no little consequence that appellant Hichez did indeed testify (Tr. 1308-56), and testified in a fashion that did not stave off an adverse determination. Hichez had made several admissions of involvement during his testimony, a fact that could not have been lost on the jury when the Court made its remarks during the charge.

## POINT IV

THE COURT DEMONSTRATED BELIEF IN THE GUILT OF APPELLANT ARAUJO TO THE JURY, SO AS TO HAVE ARROGATED THE JURY FUNCTION OF DETERMINING GUILT, AND THEREBY DEPRIVING APPELLANT ARAUJO OF HIS RIGHT TO A FAIR TRIAL BY AN IMPARTIAL COURT.

While a United States District Judge is permitted to comment on facts in evidence at a trial, Quercia v. United States, 289 U.S. 466 (1933), "the ultimate resolution of questions of fact must unmistakably be left to the jury". United States v. Bloom, 237 F. 2d. 158 (2d. Cir. 1956), at P. 163. The role of the Court in commenting upon evidence has been the subject of many decisions by this and by other Courts. The Court may not convey to the jury its belief in the defendant's guilt. United States v. Nazarro, 472 F. 2d. 302 (2d. Cir. 1973); United States v. DeSisto, 289 F. 2d. 833 (2d. Cir., 1961). A Court may neither add to nor distort the evidence. United States v. Fernandez, 480 F. 2d. 726 (2d. Cir., 1973). The Court must not usurp the functions of the jury and must take care not to give the jury the impression of partisanship on either side. United States v. Curcio, 279 F. 2d. 681 (2d. Cir., 1960).

The reasons why this proscription exists are many, but this Court stated the issue succinctly in United States v. Fernandez, supra, at P. 737:

> Under any system of jury trials, the influence of the trial judge on the jury is necessarily and properly of great weight, and that his slightest word or intimation is received with deference, and may prove controlling [citing Starr v. United States, 153 U.S. 614 (1894)].

Where the Court improperly conveys to a jury an impression of belief in the probable guilt of an accused, the effect of such a communication cannot be removed by curative instructions or by normal instructions. United States v. Brandt, 196 F. 2d. 653 (2d. Cir., 1952); United States v. DeSisto, supra. Not only must the Court refrain from interfering with the jury's determination of guilt or innocence, it "must not permit even the appearance of such an interference". United States v. Curcio, supra, at P. 682.

An appellate court is required not only to consider the entire record at trial, but must engage in

> a close scrutiny of each tile in the mosaic of the trial, so that we can determine whether instances of improper behavior, or bias, when considered individually or taken as a whole,

> may have reached that point where we can make a safe judgment that the defendant was deprived of the fair trial to which he was entitled. Opinion of Judge Kaufman, speaking in United States v. Nazarro, supra, at P. 304.

In the instant case, the Court's charge on overt acts constitutes an example of court usurpation of the jury's fact-finding role. United States v. Bloom, supra. In giving examples of overt acts, the Court happened upon the overt act charged in the indictment charged against appellant Araujo, an act - parenthetically - totally unsupported by proof:

> In or about March of 1975, the defendant Araujo provided an apartment at 611 West 156th Street, New York, N.Y.
>
> Perfectly innocent on its face, providing an apartment, but that is an overt act and it is set forth.
>
> (Tr. 1564)[10]

The significance of this charge on overt acts cannot be minimized, because the law states that a single act may be sufficient to establish participation in a conspiracy. United States v. Aviles, 274 F. 2d. 179 (2d. Cir., 1960); and the simplest definition of a conspiracy is a crime consisting of an unlawful

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10. supra, P. 16. Appellant argues that this instruction was tantamount to telling the jury to convict the accused, in view of the law of overt acts. If Araujo's providing an apartment was indeed an overt act, then he would of necessity be guilty of the conspiracy charged. It is interesting that no evidence was introduced demonstrating that it was Araujo who actually provided the apartment or made it available. No mention of him occurs until the Adames group moved in.

agreement to commit a crime and an overt act committed in furtherance of the unlawful agreement. United States v. Floyd, 496 F. 2d. 982 (2d. Cir. 1974).

The charge on overt acts was therefore sufficient to convince the jury that a conviction was mandated in the case of Araujo. The error, standing alone, is enough to justify a reversal of the conviction of appellant Araujo and the granting of a new trial.

The charge on overt acts was not the only occasion when Judge Cooper evidenced his belief in Araujo's guilt to the jury. In an exchange between Court and counsel, set forth in detail on Page 8, supra., Judge Cooper erroneously stated that Araujo had been present when money was divided up, and at conferences on many occasions. Required to correct the erroneous statement, the Court, instead of a mere retraction of the error, placed the blame on counsel by emphasizing aspects of earlier testimony: Judge Cooper said:

> You are right on that phase of it, that he was not present when the money was being divided up.
>
> You are wrong as to his having no knowledge of what was going on. I say that has been elicited. What weight the jury wishes to give to it is up to the jury. They can discount the whole thing.

What you were endeavoring to bring out was that your client was an unwilling participant and, in fact, that he didn't participate at all and he was made to come forward by use of methods that were not proper. That is what you are saying and you think your question entitles that kind of conclusion to be drawn and that the jury should gather so much therefrom, and I said no, of course not.

Mr. Naden: My question was with regard to a particular incident where first a man came looking for Mr. Araujo who was the super, and then two men cam looking for him. That line of questioning was directed only to the circumstances under which these people came to his apartment to get him to go away with them somewhere. There is also testimony about that. [11]

The Court: Your question and this witness' knowledge with regard to that particular event makes it imperative that the Court sustain the objection, and the objection is again sustained.

When you call on the Court to give an explanation, you have to take what you will get.

Neither the foregoing exchange nor the Court's charge on the law of overt acts had been "qualified ... so as to show that it was intended only as an expression of opinion, rather than as a ruling binding on the jury...." United States v. Bloom, supra, P. 164.

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11. After the police raid on the basement at 156th Street, there was testimony that first one man, then two, visited Araujo in his home to find out if the negatives had been taken by the police. Araujo is said to have accompanied the men to a meeting in a parking lot, told Adames, Hichez, and others what had happened, made the alleged proffer of investment funds, and then returned home. (Tr. 892).

The Court did make what appeared to be a ruling binding upon the jury when Judge Cooper stated "you are wrong as to his having no knowledge of what was going on. I say that has been elicited". supra. Reserving to the jury the power to decide what weight to give the evidence worked a severe limitation on their powers to decide.

These remarks alone should entitle appellant Araujo to reversal of his conviction and a new trial. Viewed in conjunction with the admission of testimony about prior similar acts, and taken along with the Court's vouching for the credibility for the witnesses produced by the Government, it becomes clear that the Court communicated its belief in the guilt of the accused to the jury and thereby influenced the ultimate verdict in the case.

A new trial is the only remedy available to appellant Araujo for his having been denied an impartial jury verdict, rendered without influence by the Court or expression's of the Court's belief.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

JOSE ARAUJO, JOHN DOE,
a/k/a "NENO", and
JORGITA RIVERA,

Defendants-Appellants.

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Docket No. 76-1085

AFFIDAVIT
OF SERVICE

STATE OF NEW YORK )
ss.:
COUNTY OF NEW YORK )

RALPH S. NADEN, being duly sworn, deposes and says:

1. I am the attorney for appellant JOSE ARAUJO, having been assigned to represent him pursuant to the provisions of the Criminal Justice Act.

2. On this day, May 14, 1976, I personally served a true copy of the within brief on appeal of appellant Araujo on the office of the United States Attorney for the Southern District of New York.

Dated: May 14, 1976

Ralph S. Naden

Sworn to before me this
14th day of May, 1976.

Milton A. Epstein

MILTON A. EPSTEIN
Notary Public, State of New York
No. 31-6195150
Qualified in New York County
Commission Expires March 30, 1978

RALPH S. NADEN
Attorney for Appellant ARAUJO
253 Broadway
New York, N.Y. 10007
(212) 964-1998

## CONCLUSION

For the foregoing reasons, the judgment must be reversed and the case remanded to the District Court for a new trial.

Respectfully submitted,

RALPH S. NADEN, Esq.
Attorney for Appellant
JOSE ARAUJO
253 Broadway
New York, N.Y. 10007
(212)964-1998

NOTICE OF ENTRY

Sir:-Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

**RALPH S. NADEN**

*Attorney for*

*Office and Post Office Address*

**253 Broadway**

**Borough of Manhattan** **New York, N. Y. 10007**

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlemen[illegible] the Hon.

one [illegible] the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc.,

**RALPH S. NADEN**

*Attorney for*

*Office and Post Office Address*

**253 Broadway**

**Borough of Manhattan** **New York, N. Y. 10007**

To

Attorney(s) for

~~XXXXXX~~ 76-1085 Year 19

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellee

-against-

JOSE ARAUJO, JOHN DOE,
a/k/a "NENO", and
JORGITA RIVERA,

Defendants-Appellants.

AFFIDAVIT OF SERVICE OF
BRIEF ON APPEAL OF APPELLANT
ARAUJO

**RALPH S. NADEN**

*Attorney for* JOSE ARAUJO

*Office and Post Office Address, Telephone*

**253 Broadway**

**Borough of Manhattan** **New York, N. Y. 10007**

**Tel. (212) 964-1998**

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

.....

Attorney(s) for